No. 25.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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THE FIDELITY MUTUAL LIFE INSURANCE COMPANY, APPELLANT,

v.

WILLIAM H. CLARK, MORRIS A. SPOONTS, CHARLES A. CULBERSON, AND PHILLIPS INVESTMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

REPLY-BRIEF FOR APPELLANT.

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(19,771.)

SUPREME COURT OF THE UNITED STATES.

THE FIDELITY MUTUAL LIFE INSURANCE COMPANY v. WILLIAM H. CLARK ET AL.	19,771. October Term, 1905. No. 270.

REPLY-BRIEF FOR APPELLANT.

So far as practicable, we shall follow in this reply-brief the order of discussion adopted in our original brief.

THE PROOF OF FRAUD.

On pages 28 to 58 of our original brief, we stated the evidence supporting the contention of the appellant that the judgment at law was procured by means of a fraud to which Mrs. Smythe was a guilty party. No answer to this has been attempted in behalf of the appellees, and no denial has been made by them of the charge of conspiracy. The brief submitted for them does contain, however, an insinuation two or three times repeated of which the following is one of the expressions.

"Yet now, because its general agent, its paid inspector and one or two other witnesses, of whose character we know nothing, say that Hunter is alive, it is to be permitted to re-open the case, and re-try in equity the issue of fact which was decided against it at law. If this is done, then the defendants may in turn inquire whether or no there be a conspiracy between Brown, Milliken et al., and if so, force another trial of the issue so long as the courts may remain open" (Brief, 71).

The "one or two other witnesses of whose character we know nothing," who constitute the "al." of "Brown, Milliken et al.," were these: (1) H. B. Taylor, inspector for a mortgage company, who knew Hunter at Quanah and Pecos: Tr., 180-181; (2) John H. Stuart, traveling agent of an agricultural implement house, who knew Hunter at Alvarado, Quanah and Dallas, and who was one of the intimate friends named by him as references in his application for the insurance: Tr., 216-218 and 394; (3) R. S. Johnson, sheriff of Reeves County, who knew Hunter at Pecos, and who, as an act of charity to Mrs. Smythe, caused a search to be made for him after his disappearance: Tr., 119-120; (4) J. B. Gibson, county attorney and former district and county clerk of Reeves County, who knew Hunter at Pecos, and who, as an act of mercy to Mrs. Smythe, searched out the camp of her missing brother, and who was her star witness at the trial of the insurance case: Tr., 94-95, 97-105, 107, and 426-436; (5) R. D. Gage, the lawyer-banker of Pecos, who knew Hunter there, with whom Hunter left his policies pending their accidental discovery by Mrs. Smythe, who appears from what they say of him on page 82 of their brief to be favorably known to counsel, and whose character as one than whom as lawyer and man none in Texas stood higher was vouched for under oath in this case by his college-mate and intimate friend, the appellee William H. Clark: Tr., 150-152, 345, and 351; (6) Judge M. L. Crawford, one of the leading lawyers of Dallas, a member of the bar of this court as its rolls will show, and who was of counsel for Hunter in his criminal prosecution and for Mrs. Smythe in this suit: Tr., 334-337 and 88; (7) the habeas corpus proceedings in Ex parte Hunter alias Hunt, showing Hunter's long fight in Alabama against extradition to Texas, and the opinion of the Court of Criminal Appeals of Texas in Hunter alias Hunt v. The State, 81 S. W. 730, showing his conviction for swindling the insurance company in this matter, and his appeal to and discharge by that court because of the insufficiency of the statute to cover the offense: Tr., 403-412 and 337.

Without further comment, we shall assume as established both the existence of the conspiracy to defraud and Mrs. Smythe's participation therein.

JURISDICTION OF THE COURTS.

We have been informed that counsel for the appellees intend to move for a dismissal of the appeal upon the ground that the existence of the constitutional question did not authorize a direct appeal of the entire case to this court. If they do so, we shall put in a separate brief on the motion whatever we may have to say on that subject. With this exception, the jurisdiction of the courts is not challenged, save in so far as it may be involved in the controversy as to the effect of the seventh amendment to the constitution. Counsel seem to have misapprehended the argument on this constitutional question contained on pages 62 to 74 of our brief; but as we believe the views there expressed to be correct, and as we have no fear that any member of this court will fail to understand them, further discussion of the topic in this place seems unnecessary.

FRAUD NOT THE ISSUE IN INSURANCE CASE.

In connection with their argument on the constitutional question, counsel for the appellees have discussed at length a matter to which we adverted briefly, under the heading of "Extrinsic Fraud," on pages 75 and 76 of our original brief, viz.: their claim that the issue of fraud was adjudicated in the insurance case. Lawyers, and sometimes courts as well, are prone to forget that it is the office of pleadings to define the issues in a lawsuit, and that ordinarily it is to them we must look in order to learn what were the issues involved in a case. Nevertheless, such is the fact.

Now, the pleadings in the insurance case do not contain a word about fraud in connection with Hunter's disappearance.

The only issue of any importance here was raised by the plaintiff's allegation that Hunter died on December 4, 1896, by drowning in the Pecos River, and by the defendant's general denial. It is perfectly true that from the beginning the officers and agents of the insurance company were convinced that the case was one of fraudulent disappearance, and fought it on that theory, and that the event has proven their sagacity. It may be conceded also that to a person of only normally developed power of believing things, the evidence adduced in that litigation must have indicated either that Hunter had died by accidental drowning or that he had disappeared for the purpose of defrauding the insurance company. Yet, theoretically at least, such an alternative was not inevitable. Hunter's body might have wandered off while his mind was already aberrant; and no motive of any kind could have been assigned for the act. The annals of the psychologists contain records of that kind. Nor was it inconceivable that, fearing prosecution for some other misdeed, Hunter should have chosen to depart from his accustomed haunts and to leave behind him a false trail that would throw the hounds off the scent. If we were at liberty to relate the remarkable story that Hunter told from the witness stand in his criminal trial, it would furnish an apt illustration of the point we are making. But the defendants in this case did not choose to have him tell it again for the delectation of the chancellor, and it is not in the record.

The burden of allegation and proof was upon the plaintiff, not upon the defendant. It had only to deny. Accordingly, the issue tried was one framed by the plaintiff, to-wit: whether Hunter died December 4, 1896, by drowning in the Pecos River, not whether he disappeared at that time for the purpose of defrauding the insurance company.

EXTRINSIC FRAUD.

It is not our contention that the case of Marshall v. Holmes overrules that of United States v. Throckmorton, or that the latter case was wrongly decided. But frequently it happens that a sharply drawn distinction, epigrammatically expressed, accurate and forceful as applied to the facts then under consideration, is adopted indiscriminately, and is misleading in its effect when the attempt is made to apply it to facts wholly different. Particularly is this true when the words were uttered by a great judge, whose memory is venerated by all lawyers. We think that these remarks have some pertinency to the language used by Mr. Justice Miller in the decision of the Throckmorton case, and that the history of subsequent litigation so shows, as pointed out on page 79 of our original brief. A test that requires interpretation before using, is a dangerous test; and to go no further, the decisions cited by counsel for the appellees sufficiently prove that this one is of that character.

Fraud is multiform and ever changing. Hence courts usually have preferred to refrain from defining in advance precisely what fraud would, and what would not, vitiate things seemingly valid. Lord Hardwicke once said that he was unwilling to declare his opinion, for fear of some new contrivance: 1 Vesey, Sr., 120. To decide as a matter of general rule that fraud of a certain kind, or fraud brought to bear in a certain way, will not destroy that which it infects, is hazardous. In this spirit was framed the statement of Chief Justice Marshall, which has been approved by judges and jurists almost without number, and which, with its paraphrase by Mr. Justice Curtis, has been cited by this court perhaps a dozen times:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which

clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law:" Marine Ins. Co. v. Hodgson, 7 Cranch 332.

It seems to us that to rest upon the rule thus clearly and broadly stated is safer than to attempt any more narrow and refined discriminations. Probably every case of this nature which has been decided rightly since its enunciation can be brought within its terms, and accounted for sufficiently by its application; and in a very great number of such cases it has been cited and relied upon.

Should forgery and perjury, both or either, open a judgment? Doubtless the truth is that sometimes they should have that effect and sometimes they should not; and trouble has come from the undertaking of courts to say, once and for all time, that they always should or never should be sufficient to move a court of equity. In many, perhaps in most, cases it is impossible to say that but for the perjury complained of the judgment must have been different. Moreover, it unfortunately is true that false swearing is encountered in a very large percentage of courthouse contests. Its presence is to be expected; and ordinarily a litigant is negligent if he announces ready for trial unprepared to meet it and to expose it. Yet there can be no doubt that Graver v. Faurot, 76 Fed. 267, and Stowell v. Eldred, 26 Wis. 504, and Birch v. Birch, L. R., (1902) P. 62, and other cases of similar character, were determined correctly. The judgments complained of in those cases were clearly unconscionable, and were obtained by perjury without which they could not have been gotten, and against which, under

the circumstances that existed, diligence could not protect. There is no sound reason why a scoundrel who chooses to put his rascality into the form of forgery, or of perjury, or of subornation of perjury, rather than into that of bribing his opponent's attorney, should enjoy securely the fruits of his fraud. The courts which, since the decision of the Throckmorton case, have busied themselves with defining what constitutes intrinsic fraud and what extrinsic fraud, have agreed pretty generally that to bribe the attorney of one's adversary is extrinsic fraud. But suppose that in the course of a litigation between A and B, A bribes B's attorney; and suppose that the circumstances are such that B ought to discover the treason of his attorney from the latter's conduct, or from other facts open to his observation; can he remain supine until after the termination of the action at law, and then call upon the chancellor to retry his controversy? Assuredly not. There is one fundamental principle that runs all the way through, and applies as well to forgery and perjury as to other species of fraud. A litigant must use a proper degree of diligence and intelligence in the management of his lawsuit. If he does this, and nevertheless an unconscionable judgment is obtained against him by the fraud of his adversary, no matter what form that fraud may take, he is entitled to relief in equity. In law as in theology, there is a tendency to a dead formalism, to a wearing of phylacteries and a repeating of rules by rote. The priesthood ought to resist this tendency, and to keep the vital principles always in mind. And we submit that in this kind of case the vital principle is as stated by the great chief justice: "*Any fact which clearly proves it to be unconscionable to execute the judgment, and * * * of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.*"

But if the magic words "intrinsic fraud" and "extrinsic fraud" have any proper place in the present discussion, their interpretation is to be sought in the facts which gave occa-

sion to their use. So interpreted, we should say that the forged instrument was an intrinsic fraud, and that the false depositions introduced in its support were an extrinsic fraud. The genuineness of the document was the very matter on trial; and the depositions were influences brought to bear for the purpose of affecting the decision of that matter of controversy. The decree was an adjudication that the paper was genuine; and that adjudication could not be overturned merely by showing that it was erroneous, which would be the whole effect of proving that the paper was forged. It could be attacked successfully only by establishing: (1) that the decree itself was procured by fraud, without the intervention of which it could not have been obtained, and to show the falsity of the depositions would be a step in that direction; (2) that no negligence of the complainant contributed to bring about the rendition of that decree; (3) that the decree was wrong, because if right it would not be vitiated by the improper means used to procure it, and only to this phase of the case would the question of forgery be relevant. The second essential element, as here analyzed, was the one which the complainant could not supply. This appears to us to be the true rationale of the Throckmorton case, in so far as its decision was based upon the original merits of the controversy, unaffected by the time and manner of instituting the suit. The decree was in no sense an adjudication that the depositions were true. Belief in them might or might not have contributed to the rendition thereof. To illustrate: suppose that in an action brought by a woman for damages for the murder of her husband, the issue is whether the killing took place in self-defense. A witness testifies that he was present and saw everything that was done, and that the fatal shot was fired while the deceased was standing with his hands up, begging for his life. The jury wholly discredits this testimony, and yet finds that the killing was not done in self-defense, because the bullet entered the dead man's back. The verdict is consistent with a belief in the statement of the witness, but

certainly the judgment based on the verdict is not an adjudication of the truth of that statement.

To apply these remarks to the present case: the question in issue in the action at law was whether Hunter had died as alleged. The jury found that he had, and the court so adjudged. That settled the matter forever between all parties and privies unless the judgment was erroneous, and unless further it was procured by the fraud of the victorious party without any contributing negligence of the defeated party. Beyond all doubt, the judgment was erroneous, for Hunter still lives. The wolf signs which he left behind when he disappeared were something collateral to the issue; they were devices employed to influence the decision of the court upon the issue; they were extrinsic fraud. The case which precipitated the memorable controversy between Lord Ellesmere and Lord Coke, mentioned on pages 64 and 65 of our original brief, was one in which Ellesmere restrained the execution of a judgment obtained by decoying the defendant's witness away from court. That surely was a collateral and extrinsic fraud. The jury did not pass upon anything which that witness said; his testimony was not before it. In the action of Mrs. Smythe (Mettler) against this appellant, Hunter was the defendant's chief and only necessary witness. To put him, living and breathing, upon the stand, and to obtain from him the statement that he was the same Hunter whose life was insured by the policies in suit, would end the case. Mrs. Smythe and Hunter conspired together to keep this witness away from court, to get him out of reach of its process, to conceal his existence even from both the court and the defendant company; and they succeeded in doing so. Why is not this a collateral and extrinsic fraud, fully within the narrowest limits that possibly can be given to that expression?

One of the chief reasons why false swearing ordinarily is not sufficient to open a judgment is that the pains and penalties of perjury, and the great opportunity which a litigant

has to sift by cross-examination the testimony of an adverse witness, are an adequate protection in most instances against this particular kind of fraud. But here, in the main, the witnesses told the truth. It was the starved horse, the imprint of the sleeper in the bed, and the one-way track ending with a mark of slipping and a broken shrub just over the river's brink that lied. Of what avail were cross-examination and the penalties of perjury here? Moreover, this was not the act of a single individual, or the aggregate of the acts of several individuals working separately, whose deeds might not always fit together with deceptive nicety. It was the carrying out of the elaborately perfected plan of Mrs. Smythe and her brother conspiring together. The great power for evil of such confederacies is recognized by the law; for everywhere a conspiracy to offend is itself a crime. In the face of such an iniquitous fraud the defendant insurance company was helpless. The court of criminal appeals has held that this sort of thing is not crime, for that the statute is not broad enough to cover it; and now this court is asked to hold that it is not "extrinsic fraud," and that so forsooth the malefactors may enjoy in peace, sitting in the shade of the courthouse, the fruits of their rascality.

We of course cannot undertake, in this hastily prepared reply-brief, to analyze all the authorities cited by counsel for the appellees upon this subject; nor is it necessary that we do so. But we do wish to say something of those upon which they principally rely, and which they emphasize by extended quotation.

In Pico v. Cohn, 91 Cal. 129, which counsel call "one of the most carefully considered decisions in the books," the question was whether a deed absolute in form really was a mortgage. Aside from the parties to the instrument, no one was present at its making except one Johnson. Pico sued to redeem, and introduced this man as a witness. Johnson swore that the deed represented a sale; but the court did not believe him, and rendered its decree for Pico. A second trial was had, Johnson dying in the meantime.

Pico's counsel desired portions of his evidence; and thinking that circumstances sufficiently discredited those parts which were adverse, they introduced the record of his testimony on the former trial, knowing it to be false and believing it to be corrupt. This time the court believed Johnson's statement, and decided against Pico. Afterward evidence was found that Johnson had been bribed, and a bill in equity was founded upon that discovery. In other words, Pico sought to open the judgment because of newly discovered evidence tending to discredit testimony which he himself had introduced after mature reflection, knowing exactly what it was, knowing that it was false, and believing it to be corrupt. The remarkable feature of that case is not its discussion of intrinsic and extrinsic fraud, but is the fact that doubt was entertained for a moment as to its proper disposition. The court gave a very poor reason for an eminently just decision.

In Pepin v. Lautman, 28 Ind. App. 74, 62 N. E. 60, the defeated defendants in a foreclosure suit endeavored to set aside the judgment because the plaintiff had testified falsely, an offense of which they had not believed that he would be guilty. They alleged the newly discovered fact that he had account books which, if produced, would prove that his testimony was untrue. But the record did not show that when they heard his statement, knowing that it was false, they made any effort to meet it, or to get time in which to meet it, or that they undertook by cross-examination to learn of the existence of books, though the plaintiff was a merchant with whom they had traded and who might have been presumed to keep books. Nor did the record show that after judgment had been rendered against them they moved for a new trial. Their claim to equitable relief evidently was barred by their own gross negligence.

Counsel quote some vigorous words spoken obiter by Lord Justice James in Flower v. Lloyd, L. R., 10 Ch. D. 327. That was a suit to restrain infringement of a patent process of litho-

graphing on tin. In the course of the litigation, an expert was sent to inspect the process used by the defendants, and his was substantially the only evidence on the subject. Upon it, the vice chancellor rendered a judgment for the plaintiff, which the court of appeal reversed, dismissing the suit. After this, three recently discharged employés made affidavits tending to show that when the expert visited the works the defendants concealed from him parts of their process, so that he had no opportunity of discovering wherein it was like that of the plaintiff. Thereupon the plaintiff moved for a rehearing in the court of appeal, with leave to introduce this new evidence. The court denied the motion, upon the ground that the plaintiff could get relief by a suit in the lower court to set aside the decree because it was obtained by fraud. Such a suit was instituted, and upon hearing the evidence, the vice chancellor did set aside the former decree as having been obtained by the fraud above mentioned. The court of appeal reversed this decision, solely because in its opinion the evidence failed to establish the fraud. The case stands, therefore, as a clear authority for the proposition that the former decree should have been set aside because obtained by the fraud alleged if such fraud had been proven. The first decision of the court of appeal is reported at L. R., 6 Ch. D. 297. The opinions rendered by the judges are interesting. We quote from them:

Jessel, M. R. "If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy. * * * Now, had the court of chancery any jurisdiction to give relief in such a case? It plainly had. I will read from the well known treatise of Lord Redesdale: 'If a decree has been obtained by fraud it may be impeached by original bill.' * * * Now that being so, supposing the court of appeal has no jurisdiction to do what is now asked, there would be means of obtaining justice by an original action."

James, L. J. "I agree with what has been said by the Master of the Rolls, that in the case of a decree (or judgment as we call it now) being obtained by fraud there always was power, and there still is power, in the courts of law in this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud, and that fraud only. You cannot go to your adversary and say, 'You obtained the judgment by fraud, and I will have a rehearing on the whole case' until that fraud is established. The thing must be tried as a distinct and positive issue: 'You, the defendants, or you, the plaintiff, obtained that judgment or decree in your favor by fraud; you bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud.' That would be tried like anything else by evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried. That was the old course of the law, and there seems to be no reason why that should not be now followed; and if it was true that there was a fraud practiced upon the court, by which the court was induced to make a wrong decree, the way to obtain relief will be to bring a fresh action to set aside the decree on the ground of fraud."

Baggallay, L. J., after saying that at first he felt hesitation in denying jurisdiction to do what was asked, continued: "But, upon further consideration of the case, I think that justice can be done by adopting a course analogous to that taken under the old practice, where when a decree had been obtained by fraud a bill was filed in the original court in which the suit had been brought for the purpose of setting the decree aside. I therefore do not see any reason to dissent from the view expressed by the other members of the court."

When the case got back to the court of appeal the second time, after deciding unanimously that as a matter of fact there was no fraud, James, L. J., delivered the remarks quoted by counsel, in which Thesiger, L. J., concurred. Baggallay, L. J., then said:

"With reference to the observations which have just been made by the Lord Justice, I only wish to state that, whilst I am fully sensible of the evils and inconveniences which must arise from reopening what are apparently final judg-

ments between litigating parties, I desire to reserve for myself an opportunity of fully considering the question how, having regard to general principles and authority, it will be proper to deal with cases, if and when any such shall arise, in which it shall be clearly found that a judgment has been obtained by the fraud of one of the parties, which judgment, but for such fraud, would have been in favor of the other party. I should much regret to feel myself compelled to hold that the court had no power to deprive the successful party of the advantages to be derived from what he had so obtained by fraud."

Flower v. Lloyd has been cited frequently in the English courts, and has been used as authority for the proposition that a fraudulently procured judgment will be set aside in a new suit brought for the purpose. The remarks of Lord Justice James have been treated as cautionary merely: See, for instance, Boswell v. Coaks (House of Lords, 1894), 6 Rep. 167. Cole v. Langford, L. R., (1898) 2 Q. B. 36, was such a case. There a verdict and judgment were set aside because they had been obtained by the introduction in evidence of forged letters and of memorandum books containing fa and fraudulent entries. Ridley, J., said that he thought the plaintiff was entitled to judgment. Then Phillimore, J., said: "I am of the same opinion. There are several cases since Flower v. Lloyd in which this jurisdiction has been exercised, notably the case of Priestman v. Thomas," L. R., 9 P. D. 210.

Another recent case is that of Birch v. Birch, L. R., (1902) P. 62 and 130. This was a motion to dismiss on summary hearing in accordance with the English practice an action brought to set aside the fraudulently procured probate of a will. The fraud alleged was this. When the will was propounded, the witnesses to it could not be produced. Thereupon one Guise, himself not a party to the proceedings, but the husband of a party, testified that he had found a man, a stranger to him, who was a witness to the instructions for the will. This man then was called, and testified; and the will was admitted to probate. Afterward he confessed that the

will was forged at the instance of Guise, and that the evidence supporting it of course was fraudulent. Barnes, J., denied the motion, holding that a judgment may be impeached for fraud, and that Guise was interested and was acting as agent for his wife, who was a party. On appeal, with new affidavits and counter-affidavits, the decision was reversed, solely because it did not seem probable that substantial evidence could be brought to support the charge of fraud. Cozens-Hardy, L. J., in his opinion, concurred in by Stirling, L. J., said:

"The present action is an independent proceeding to set aside that judgment on the ground that it was obtained by fraud. I do not doubt that such an action may be maintained, at least when the judgment has been procured by the fraud of a party to the action. Here Henry Guise, against whom fraud is alleged, was acting for and as the agent of his wife, who was a party, and she must be affected by his fraud."

The late case last cited has its exact parallel in a very old one, Barnesly v. Powel, 1 Vesey, Sr., 119 and 284. This was a bill before Lord Hardwicke to be relieved in chancery against a forged will, "which was not without evidence to support it, although there was strong suspicion of forgery," and the probate of which in the ecclesiastical court had been obtained by fraud. The report does not show the nature of the fraud, but naturally it would be perjury, or mis-representation in some form. The verdict of a special jury having been taken to the effect that the will was forged, Lord Hardwicke ordered the defendants to consent in the ecclesiastical court to the revocation of the decree of probate. For some purpose a decree had been obtained also in the court of exchequer that the will had been well proven, and Lord Hardwicke restrained Powel "from setting up that decree in respect of the real estate, or claiming any benefit thereby."

We shall close our discussion of this subject with some emphatic language used by Lord Brougham in a notable case in

the House of Lords, wherein foreclosure decrees were set aside for fraud in a suit brought after a lapse of more than forty years against the heirs of the man who had purchased under them:

"In co-ordinate courts there can be no review at all. But if the decree has been obtained by fraud; if the whole suit has been concocted from the beginning to the end in fraud, that decree shall avail nothing for the party obtaining it in the further prosecution of his claims, and it shall avail nothing against the party affected by it, and against whom it is set up, to the defeating of his right, to the destruction of his property, or to stay the prosecution of the claim against those who have done so:" Bandon v. Becher, 9 Bligh, N. S., 532 (570).

LIABILITY OF THE APPELLEES.

Upon this subject it does not appear to us to be necessary to add very much to what was said in our original brief, aside from some consideration of the authorities cited for the appellees. On pages 81 to 95 of their brief, counsel for the appellees present a statement of facts which they assure the court is "fair and succinct," but which to a great extent lacks the customary references to the transcript for its verification. We should have been glad to have these references, because for quite a number of the averments we have been unable to find any authority.

It is true that contracts for contingent attorneys' fees are upheld in Texas, and that an attorney so contracting is not required to give security for costs in behalf of his client, and that relationship to an attorney holding such an agreement does not disqualify a judge. Judges are not disqualified under the Texas statutes on account of relationship to any person not "a party" to the suit; and under the statutes no one but "the plaintiff" is required to give security for costs. The courts have held that the legislature used the words "party" and "plaintiff" in their technical sense, and that the

possession of an interest in a litigation does not make one either a "plaintiff" or a "party."

Counsel say on page 95:

"In the present case the complainant disclaims any liability of these respondents on the theory of wrongful conversion. It seems instead, to be seeking to rest its case upon some theory of trusteeship on the part of these respondents. Confused with this idea is that of following its funds, and should it fail in these remedies, it seems to gather comfort from the assumption that possibly respondents are liable as for money had and received. Should all these fail, then the long array of decisions about the vulnerability of judgments in the hands of assignees to equities existing between the original parties is relied on. We believe the fair and succinct statement of the facts detailed above explodes all these conflicting, vaguely defined and unsupported theories."

We hope the court will acquit us of the charge of confusion of ideas; and we beg to disclaim responsibility for the numerous theories which counsel attribute to us in order that they may have the pleasure of "exploding" them by their "fair and succinct statement." It is, however, somewhat remarkable that they find so many theories upon which they seem to fear that the court may grant the relief sought. Is it a case of all roads leading to Rome? The only theory for which we are responsible is, we think, expressed with a reasonable degree of clearness on pages 119 and 120 of our original brief, where we say:

"The appellant's theory of its case may be summarized as follows.

"The appellees got possession of the plaintiff's money through the fraud of their co-defendant, Mrs. Smythe. Therefore it has a right of action at law against them to recover its money by them had and received, unless they are entitled to be protected as purchasers for value and without notice. But if it were to sue at law it would be met by a good plea of former adjudication. Hence it is compelled to resort to a court of equity to prevent the setting up of such a plea. The court of equity, thus having obtained jurisdic-

tion, will proceed to grant full relief by itself ordering the return of the money if the circumstances require its restoration. No use of the judgment ought to be permitted, because it was procured by fraud practiced upon the court and the appellant in the litigation itself, and not merely by fraud wrought into the cause of action sued upon. * * *

"For several reasons the appellees are not entitled to be protected as purchasers for value and without notice. (1) Each of them received his part of the fund directly from the court in which the appellant had deposited it in satisfaction of the judgment; and in legal effect this is the same as if the appellant, acting under compulsion of the judgment, had given its own checks to the appellees for the portions by them severally claimed. (2) Each of them received what he got in right of ownership enjoyed by virtue of a previous assignment to him of an interest in the insurance policies, or in the judgment, or in the fund resulting therefrom. They cannot be protected as innocent purchasers of any one of these things; because no one of them possesses the property of being transferable free from existing equities. (3) They cannot be protected as purchasers without notice, for the additional reason that, with the possible exception of Phillips Investment Company, each of them had at the time of first acquiring his interest in the fund, or in that from which the fund arose, actual notice of the appellant's claim that Hunter was not dead, and that therefore it owed no one anything on account of the policies."

There is no occasion for the appellant to follow a trust fund. Each of the appellees got its money directly from it, in contemplation of law. Nobody embezzled its money. There is no trust fund in the case, except in so far as one who has in his possession property equitably belonging to another may be said to hold it in trust for the owner. In this case it cannot be of any significance that the appellees have not the money now in hand. They did have it. They received its benefits. They bought property with it, or paid debts with it. It passed into their estates, making them just so much the richer; and in that sense no doubt they have it now. If one is seeking merely to follow a fund, of course he must find it first of all. But that is not this case.

Here it is claimed that the appellees received the appellant's money under circumstances which in law created an implied obligation to return it. This obligation they have not met; and what they have done with the money is wholly immaterial.

The appellant does not invoke the doctrine of lis pendens. Therefore we think irrelevant the decisions that one who purchases land from a person whose title has been confirmed by judgment is not a purchaser pendente lite, though the time for appeal has not yet expired; and that his rights are not affected by the reversal of the judgment in an appeal subsequently prosecuted.

The appellant's suit, save in so far as it asks preliminary relief in equity against the judgment, is virtually an action for money had and received. We understand that, while classed as an action at law, this suit always has been held to proceed upon equitable grounds. The broad question is whether the defendant has received money to which the plaintiff has the better right, which under all the circumstances it is inequitable and unjust for the defendant to retain, and which, ex aequo et bono, he ought to refund. We shall now attempt, in the light of this principle, to analyze some of the more important cases cited by counsel.

Clifford & Bntg. Co. v. Donovan Com. Co., Mo. 94 S.W. 527.

Bank of United States v. Bank of Washington, 6 Peters 8, cited on page 95. Triplett & Neale recovered a judgment against the Bank of Washington, which the latter paid to the Bank of the United States as agent of Triplett & Neale, notifying it verbally that a writ of error was contemplated and that if the judgment were reversed the Bank of the United States would be expected to return the money. The Bank of the United States placed the money to the credit of Triplett & Neale, asked for instructions as to how it should be applied, and upon such instructions applied it upon certain debts owing to itself. The writ of error having been prosecuted and the judgment reversed, the Bank of Washington sued the Bank of the United States to recover the money. It was held that the judgment was in full force

when the payment was made, Triplett & Neale then having the right to demand payment; and that the subsequent reversal of the judgment gave a right of action against Triplett & Neale, but not against the bank which had no interest in the matter, and receiving the money only as agent had disbursed it in accordance with the directions of its principal. This case would be in point if the appellant were suing the appellee Clark for the money which he received as attorney of record for Mrs. Smythe (Mettler) and remitted to her.

Holly v. Missionary Society, 180 U. S. 284, cited on pages 95 and 96-8. Dr Saul left by will to the missionary society three-fourths of his estate, to be appropriated one-third each to domestic missions, foreign missions, and colored missions. Afterwards, by codicil, he made the missionary society his residuary legatee. His estate amounted to $17,268.03, of which $14,927.54 was awarded to the missionary society. On June 19, 1890, Thompson, one of the two executors, called at the office of the missionary society, exhibited a memorandum showing due to it the above mentioned sum of $14,927.54 and $650 of dividends received after the award, and gave it in settlement of the legacy his individual check for $15,577.54. The missionary society deposited the check to the credit of its general account in bank, and before receiving notice that anything was wrong expended its proceeds in accordance with the directions of Dr. Saul's will. In May, 1890, Holly bought a house and employed Thompson to look after the title. On June 19, 1890, he gave Thompson his check for $12,000 wherewith to pay for the house. He heard no more of the matter until July 15, 1890, when he learned that Thompson had attempted suicide. Finding then on investigation that Thompson had paid $10,028 of his money to the missionary society in the transaction above described, he sued to recover that amount from the society. Thus it appears that Holly and the society were entire strangers; that Thompson occupied no position of trust with reference to the society, being in his representative

capacity its debtor and nothing more; that the funds left by Dr. Saul to the society were not given to it generally, save possibly to the extent of the residuary legacy as to which the record is silent, the money being entrusted to it for specified purposes and it being constituted in this way his agent for the disbursement thereof in accordance with his directions; that the payment was made by Thompson to the society in the form of a negotiable check having no earmarks to connect it with any trust fund; that before notice of anything wrong the society had executed its agency by disbursing all of the money as directed in the will; and that Holly was the only party to the transaction who had trusted Thompson and placed him in position to perpetrate the wrong. Thus this case falls within the same rule as the bank case in 6 Peters, namely: that it is not equitable that an agent who in good faith receives money for his principal and disburses it on account of his principal should be called upon personally to return the money because of some defect in his principal's title, a rule which is itself only a particular application of two or three broader rules.

Merchants' Ins. Co. v. Abbott, 131 Mass. 397, cited on pages 95 and 98-100. The company had a policy of fire insurance on property of Abbott, which he caused to be burned on March 17, 1876. Abbott furnished proofs of loss, and the claims were adjusted in due course, without discovery of any reason for refusing to pay. Abbott owed Denny, Rice & Co. about $4,000, and in April, 1876, after the adjustment of the loss, he paid them about $1,500 and gave them as security an assignment of his claim against the insurance company. In June, 1876, the company paid them the amount due under the policy, exactly liquidating Abbott's debt. In May, 1877, the company learned that it had been defrauded. In June, 1877, Abbott went into bankruptcy, and in the following October received his discharge. In January, 1878, the company sued both Abbott and Denny, Rice & Co. to recover the money. The court held that it was entitled to recover as against Abbott, but not as

against Denny, Rice & Co. Thus it appears that the assignees were wholly innocent; that they had nothing to do with the effectuation of the fraud; that they received a voluntary payment of a claim for a specific sum of money which had been assigned to them after its adjustment by agreement between their assignor and his debtor; that in consideration of such payment they surrendered a valid demand of like amount against their assignor, which his discharge in bankruptcy occurring more than a year later would have barred if they had been compelled to return the money. Manifestly it was not equitable under the circumstances that they should have to make good the insurance company's loss, against which a closer investigation at the time of the fire probably would have protected it. The present case is quite different. The fraud was effectuated through the efforts of the lawyer appellees, and the only consideration which they gave for what they got was their services rendered against the appellant. The payment which they received was not voluntary, but was forced by them after all possible resistance had been made. The insurance company had been guilty of no want of diligence to protect itself. They did not acquire their interests in the fund by assignment for value after an amicable adjustment between their assignor and the insurance company, and without suspicion of possible dispute; but they acquired them by buying into an existing controversy, and rendering in consideration therefor their services in connection with such controversy. Their claims against their assignor and against each other had not been barred by bankruptcy, limitations, or otherwise at the institution of this suit, but could have been adjusted and enforced by means of cross bills in this suit if they had deemed such adjustment and enforcement desirable.

Walker v. Conant, 69 Mich. 321, cited on page 96. Van Riper got $1,000 from Mrs. Conant on a forged mortgage. Afterwards he obtained $4,000 from Walker on another forged mortgage covering the same property, and by his direction Walker paid off Mrs. Conant's claim out of the

proceeds of his loan. The payment was made by Mrs. Conant's agent sending the papers to Walker's agent at his request, and by Walker's agent depositing the money in bank to the credit of Mrs. Conant's agent. Walker was no worse off because of paying the money to Mrs. Conant instead of to Van Riper, and Mrs. Conant was worse off by her surrender and the probable destruction of her papers. This appears to have been a payment of money into bank, and money passes free from secret equities. Both parties were equally innocent and equally negligent. If there was any difference in equity it was in favor of Mrs. Conant, who gave up her papers for the money at the request of Walker, and not upon her own initiative in any way. There was no ground for shifting the loss. Yet upon these facts, Chief Justice Sherwood dissented.

Langley v. Warner, 3 N. Y., 327, cited on page 96. On November 14, 1845, Walsh obtained against Langley a judgment for $76.22, Warner being his attorney. On the next day a writ of certiorari was served to remove the case into a higher court; but there was no supersedeas. The judgment was collected by an officer on execution and paid to Warner as attorney for Walsh. Walsh being indebted to Warner consented that the latter retain the money for credit of his account. In January, 1846, the judgment was reversed, and a writ of restitution was awarded against Walsh. Walsh having failed to restore the money, Langley sued Warner for it in the action for money had and received. The court, speaking through Chief Justice Bronson, made our distinctions for us. We quote:

"If the defendant had been the assignee of the demand on which the suit was brought by Walsh in the marine court, and had commenced and carried on the suit in the name of Walsh, but for his own benefit, he would have been bound, on the reversal of the judgment, to refund the money which had been collected on the execution." * * * But, "Walsh had a perfect title to the money when it was collected—just as perfect as it would have been if no certiorari had been issued. He had a right to do what he pleased with

the money; and he made a very proper use of it by paying his debt." * * * "We are referred to cases where money paid to an agent has been recovered back from him, notwithstanding the fact that he had given his principal credit for the money in account. But they are all cases where the principal had no right to the money at the time it was paid to the agent; while here, the principal had a perfect right to the money at the time his agent received it. The distinction is obvious; and I cannot but marvel that it should have been overlooked."

In the case at bar, Messrs. Clark and Culberson were assignees of interests in the cause of action, and prosecuted the suit in their assignor's name for their joint benefit. Neither they nor any other of the appellees received the money as agents of the judgment creditor; but each received it in his own name and right, as part owner of the fund. When received, the judgment creditor had no right to the money, because her judgment had been procured by means of her own fraud.

Justh v. National Bank of the Commonwealth, 56 N. Y. 478, and Stephens v. Board of Education, 79 N. Y. 183, cited on page 96, are both mere cases of failure to follow embezzled or fraudulently procured funds into the hands of innocent parties who had nothing to do with the fraudulent transactions, and who acquired the funds in the form of negotiable checks, in good faith and for a valuable consideration.

Glover v. Coit, 36 Tex. Civ. App. 104, cited on pages 96 and 100-102. Coit died leaving a will in which he left all his property to his wife. Its probate was contested on the ground that it was procured by undue influence. This was found not to be true, and the will was admitted to probate. Then the devisee conveyed certain land to her attorneys in payment of their fees earned in the litigation. Their interest in the land appears to have originated at that time, after the rendition of the judgment probating the will. Afterwards, certiorari was had, and the case was tried anew in the district court. Contemporaneously, the attorneys brought suit

against the heirs to quiet their title. The two cases were consolidated, and a verdict on special issues was taken. Upon the jury's findings, the court rendered judgment establishing the will, and awarding the land in controversy to the attorneys. It was said that the judgment of probate was in full force when the conveyance to the attorneys was made, that the issue of fraud had been adjudicated therein, and that they had a right to rely upon that adjudication. It is to be noted, that the fraud charged was fraud practiced in procuring the will, not in procuring the judgment; that the existence of such fraud was the very matter in dispute in the probate proceedings; and that when the attorneys bought the land there was a subsisting judgment in full force, which settled that matter. Moreover, the second trial also resulted in a judgment that the will was valid. In the case at bar, all the appellees except Mr. Spoonts bought while there was no judgment in force; and what they bought was not property incidentally affected by the litigation, but was an interest in the cause of action and suit itself; and the fraud charged was fraud practiced in the litigation.

The other cases cited by counsel on pages 95 to 102 of their brief do not appear to us to be closely enough in point to justify detailed analysis here.

It is contended by the appellees that because the appellant discharged the judgment without waiting for the service of an execution, its payment was voluntary and it is not entitled to restitution. This is not a suit to recover money paid under duress; it is a suit to get back money obtained by fraud. Suppose there had been no judgment; suppose that Mrs. Smythe had assigned to the appellees interests in her claim just as she did, and that they, being themselves misled by her fraud, had presented the case to the appellant so forcibly as to deceive it and to induce it to pay the policies without suit: there would have been no compulsion, but the appellant would have had the same right of action for the return of the money that now exists. There can be no doubt, however,

that this payment was made under compulsion, though probably the situation could not be said to constitute a technical duress. It had exhausted all its means of defending against the claim by the use of facts then known. There was nothing left for it to do but to pay the judgment. An execution would issue within a few days, and under the statutes of Texas, if it failed to pay the same promptly, its license to do business in the state would be revoked. To say that for the purposes of this suit the appellant's payment, made under such circumstances, should be classed as a voluntary payment, is absurd.

For answer to that portion of the argument of counsel contained on pages 105 to 107, we cannot do better than to refer the court to pages 106 to 116 of our original brief. That the rights of the parties are to be determined by the same rules that would be applicable if the appellees had taken no assignments of interests in the policies, judgment, or fund arising therefrom, and if Mrs. Smythe had collected her judgment, and out of its proceeds when reduced to the form of money or of credit in bank had paid fees to her attorneys, and they in turn had paid their debts in the usual manner, is a contention which we think the undisputed facts do not justify. In a rough and general way it is true that by virtue of what was done the lawyers got pay for their services, and the investment company got the sum due upon its note. But they were not content to permit the matter to follow the usual channels. They desired and obtained the protection of assignments of specific interests in the controversy; and we see no good reason why they should not bear now the responsibilities incident to the position which they voluntarily assumed then for their own benefit and without consulting the wishes of the appellant.

Respectfully submitted,

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APRIL 24, 1906.